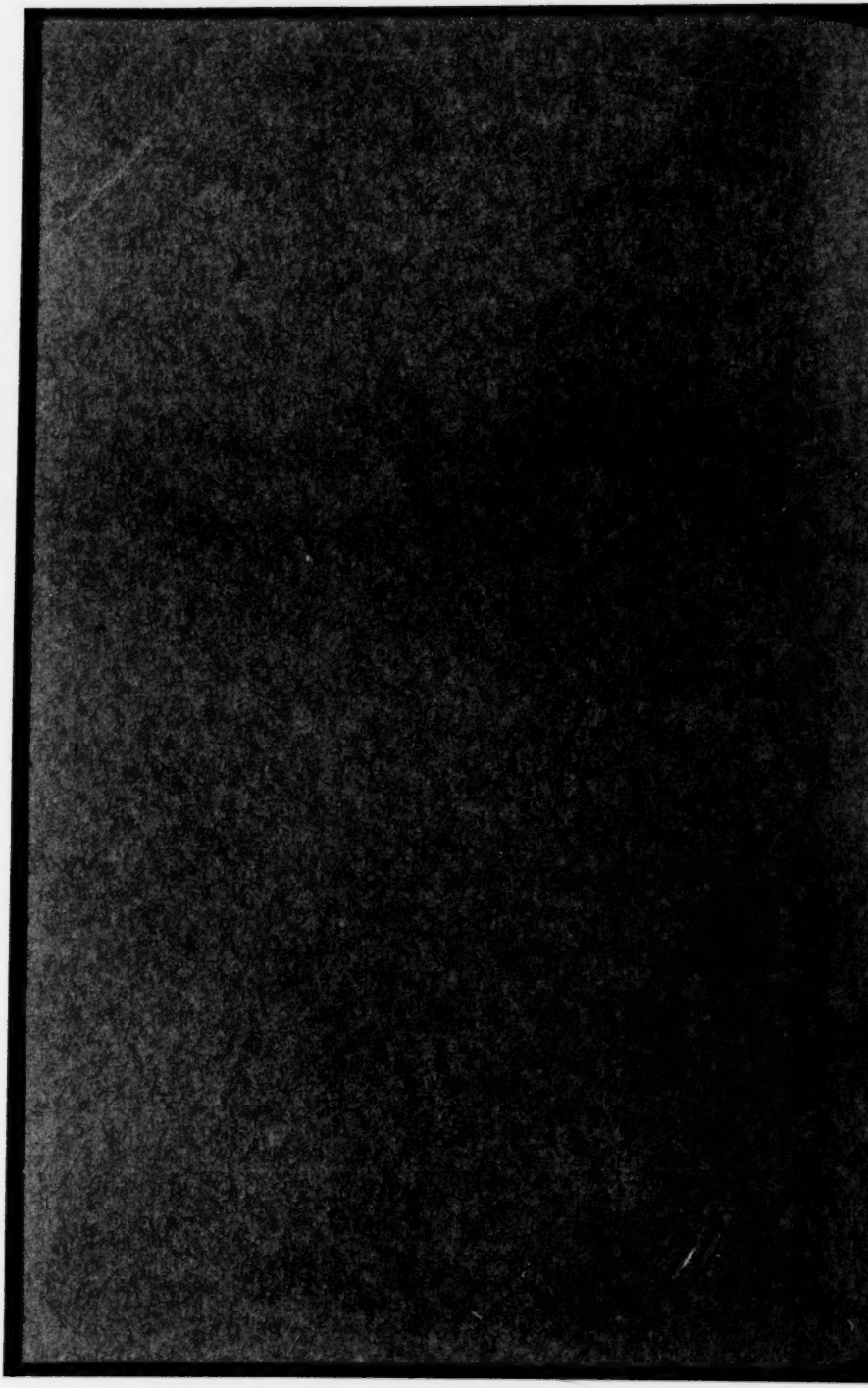

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 956

J. P. GARDZIELEWSKI, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Circuit Court of Appeals (R. 147–154) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 16, 1942 (R. 155). The petition for a writ of certiorari was filed February 16, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in the trial of a principal and one charged with aiding and abetting him in the commission of a crime, statements by or to the principal made outside of the presence of the aider and abettor, some of which were made in the course of the conspiracy and the others of which did not tend to incriminate the aider and abettor, are admissible against the latter.

STATUTES INVOLVED

Section 117 of the Criminal Code (18 U. S. C. 207) provides in part:

> Whoever, being an officer of the United States, or a person acting for or on behalf of the United States * * * shall ask, accept, or receive any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding * * * influenced thereby, shall be fined not more than three times the amount of money * * * so asked, accepted, or received, and imprisoned not more than three years; * * *.

Section 332 of the Criminal Code (18 U. S. C. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

On May 16, 1941, petitioner and Joseph M. Nosek were indicted on two counts in the Northern District of Illinois, the indictment charging that Nosek, who was chairman of a Chicago local selective service draft board, asked, accepted, and received money from one Walter Kukovec, a draft registrant, with intent to have his action and decision on the matter of Kukovec's classification under the Selective Training and Service Act of 1940 influenced thereby. Petitioner, who was the examining physician for the local board of which Nosek was chairman (R. 110), was charged in each count with having aided, abetted, and counselled Nosek in asking, accepting, and receiving the money from Kukovec. (R. 2–4.)

Petitioner's motion for a severance (R. 6–8) was denied (R. 10) and he and Nosek were tried together (R. 13).[1] The pertinent facts relating to the evidence which petitioner claims was improperly admitted over his objections may be summarized as follows:

Kukovec testified that on May 1, 1941, immediately after his physical examination by petitioner, he told petitioner that his mother was in a state hospital and that he was going to ask the local board for a six months' deferment so that he could earn money to leave for her when he enlisted in the

[1] Petitioner does not contend that the trial court erred in denying a severance.

fall (R. 14–15). Petitioner replied, "You don't have to go to the Draft Board, you go over and see Joe Nosek," and told Kukovec that his examination "balanced," that "You go or you don't." After questioning Kukovec regarding his work and income, petitioner asked him whether it was worth $30 to him "to stay out of the army," explaining, "Well, you know it will make the pen write easier." Without waiting for a reply, petitioner called Nosek on the telephone and told him that Kukovec was coming over to see him "about a six months' deferment." (R. 15.) Kukovec went to Nosek's office and, after some preliminary conversation, the latter told him, "If you bring me $35 I will have you put in Class 1–B," a deferred classification for "temporary physical disability" (R. 15–16). Kukovec had no money with him and arranged to meet Nosek that evening (R. 16). Immediately after leaving Nosek's office, Kukovec reported the incident to the War Department, whence he was taken to the central selective service board, the United States Attorney's office, and the Federal Bureau of Investigation (R. 16–17). Kukovec returned to Nosek's office in the evening and paid him $10, promising to return the next day with the balance (R. 17–19). The following day, May 2, Kukovec paid Nosek $25 in three bills which had been marked by agents of the Federal

Bureau of Investigation (R. 19; see also R. 42).[2]

Kukovec was also permitted to testify, over petitioner's objection, that when he arrived at Nosek's office from petitioner's on May 1, he told Nosek, "The doctor sent me," that Nosek replied, "Oh, yes, you are Walter Kukovec, you came to see me about a six months' deferment" (R. 15), and that Nosek stated during this conversation, "I have helped about fifteen fellows and several of them went ahead and got drunk— * * * and were bragging in saloon on how they fixed the draft" (R. 15–16).

Logue, one of the agents who arrested Nosek in the latter's office immediately following Kukovec's payment to him of $25 on May 2 (R. 42–43), testified that Nosek said on that occasion, "Of all the opportunities I have had for big money to think I would get hooked on a little thing like this" (R. 44). Logue also testified that Nosek admitted that he knew what the arrest "was all about" (R. 44), and that Nosek said, "That is what you get for trying to be a good fellow and doing a man a favor" (R. 45). Dixon, another agent (R. 49), and Tobin, a deputy marshal who accompanied the agents (R. 59), also testified that Nosek made such statements at the time of his arrest (R. 50–51, 60). Peti-

[2] Two of these bills were found on Nosek's person by the agents, who entered his office and arrested him immediately after he had received the payment from Kukovec. The third was found in the possession of Nosek's secretary. (R. 19, 43–45, 51–52.)

tioner's objection to this testimony on the ground that the statements were made outside of his presence (R. 43, 51), was overruled (R. 43; see also R. 18–19, 51).

Petitioner and Nosek were convicted (R. 127, 150) and petitioner was sentenced to imprisonment for two years (R. 128). On appeal by petitioner alone, his conviction was affirmed (R. 155). In respect of petitioner's claim of error in the admission of the testimony of Kukovec, Logue, Dixon, and Tobin relating to their conversations with Nosek, the majority of the court below held that in view of the trial judge's statements during the trial that he would instruct the jury at the close of the evidence concerning these conversations, and in the absence of record proof to the contrary, it must be assumed that he correctly charged the jury regarding their consideration of this testimony. The majority also held that the judge properly denied petitioner's motions made during the course of the trial to exclude the testimony, because it was admissible to establish the commission of the crime by Nosek, an essential element in the proof of the charge that petitioner aided and abetted Nosek. (R. 150.) The dissenting judge was of the opinion that the testimony was inadmissible as against petitioner and was prejudicial because the evidence to support petitioner's conviction was not strong, and that, on the record, it could not be presumed that the trial judge correctly instructed the jury concerning it (R. 151–154).

ARGUMENT

Petitioner's sole contention here is that the trial court committed reversible error in admitting the testimony of Kukovec and the officers concerning their conversations with Nosek outside the presence of petitioner (Pet. 5, 11–12, 20–24). We think petitioner's argument is founded upon a misconception of the applicable rules of evidence.

1. The proof clearly pointed to the existence of a conspiracy between Nosek and petitioner (*supra*, pp. 3–5), and Nosek's statements to Kukovec on May 1, 1941, prior to Nosek's arrest, which tended to incriminate petitioner, were in furtherance of that conspiracy. It is settled that if a conspiracy is shown, the declarations of one defendant outside the presence of his co-defendants but in the course of the conspiracy, are admissible against the latter even though a conspiracy is not charged in the indictment.[3]

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[3] *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 249; *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *Lee Dip* v. *United States*, 92 F. (2d) 802, 803 (C. C. A. 9), certiorari denied, 303 U. S. 638; *Coplin* v. *United States*, 88 F. (2d) 652, 660–661 (C. C. A. 9), certiorari denied, 301 U. S. 703; *Cossack* v. *United States*, 82 F. (2d) 214, 216 (C. C. A. 9), certiorari denied, 298 U. S. 654; *Quercia* v. *United States*, 70 F. (2d) 997, 998–999 (C. C. A. 1), reversed on other grounds, 289 U. S. 466; *Friscia* v. *United States*, 63 F. (2d) 977, 981 (C. C. A. 5), certiorari denied, 289 U. S. 762; *Zarate* v. *United States*, 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867.

Petitioner's reliance (Pet. 17, 22–23) upon the rule that statements of a conspirator not made in furtherance of the

2. Nosek's admissions to the officers at the time of his arrest on May 2 were clearly admissible to prove his guilt of the crime for which petitioner was jointly tried as an aider and abettor. Admissions and confessions of a principal may be received at the trial of one charged with aiding and abetting for the purpose of establishing the commission of the crime by the principal, and limitations upon the admission of evidence of acts and declarations of conspirators relied upon by petitioner (Pet. 17, 22–23), are not applicable.[4] Of course, if an admission or confession of the principal tends to incriminate the aider and abettor, only that portion of it which tends to establish the guilt of the principal may be admitted (*Hale* v. *United States,* 25 F. (2d) 430, 438 (C. C. A. 8); *State* v. *Lyda,* 129 Wash. 298, 301–305), or the jury must be cautioned that the admission or confession is the principal's alone

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conspiracy but consisting merely of recitals of past transactions between the conspirators are inadmissible against a co-conspirator, is ill founded. Nosek's statements to Kukovec were not of that character, but, on the contrary, were in execution of the conspiracy. The conspiracy was not terminated until the arrest of Nosek and petitioner on May 2.

[4] *Hale* v. *United States*, 25 F. (2d) 430, 438 (C. C. A. 8); *United States* v. *Hartwell*, 26 Fed. Cas. 196, 201–202 (C. C. D. Mass.), affirmed in part and reversed in part on other grounds, 6 Wall. 385; *State* v. *Lyda*, 129 Wash. 298, 300; *State* v. *Mann*, 39 Wash. 144, 151; *Howard* v. *State*, 109 Ga. 137, 140; *Givens* v. *State*, 103 Tenn. 648, 661; *Gibson* v. *State*, 53 Tex. Cr. 349, 363–364; *Mulligan* v. *People*, 68 Colo. 17, 25–26; *State* v. *Mullins*, 95 Kans. 280, 291–295; cf. 4 Wigmore, *Evidence* (3d ed. 1940), sec. 1079.

and may not be considered as against the aider and abettor (*State* v. *Mann,* 39 Wash. 144, 151–153). In the instant case, nothing in the admissions of Nosek made to the arresting officers after the termination of the conspiracy in any way incriminated petitioner. Hence, they were admissible against petitioner in the form in which they were received to prove Nosek's guilt. It follows, therefore, that the trial court properly overruled petitioner's objections to their admission and properly denied his motion to strike the evidence and to instruct the jury that it was "not to be considered at all as against" petitioner (R. 67, 125).[5]

3. Since Kukovec's testimony was admissible as proof of petitioner's guilt, and since the testimony of the officers in no way incriminated him, there was

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[5] Nothing in *Rooney* v. *United States*, 203 Fed. 928 (C. C. A. 9), cited by petitioner (Pet. 20), is inconsistent with these principles. It was there held that the acquittal of the principal is no bar to the conviction of the alleged accessory since an accessory is made a principal by Section 332 of the Criminal Code. But it does not follow that in a trial of the aider and abettor the prosecution is relieved of proving the commission of the crime.

Hendrey v. *United States*, 233 Fed. 5 (C. C. A. 6), also relied on by petitioner (Pet. 27), held that, where evidence is received which is admissible against some of several co-conspirators, but not against others, the jury must be instructed in respect of such evidence. But there the court was speaking of statements made and acts done after the termination of the conspiracy. As we have pointed out, evidence of admissions made by a principal are admissible in a joint trial of the principal and aider and abettor under a distinct rule of evidence.

no occasion for the trial judge specially to instruct the jury regarding its consideration of this evidence. Hence, we need not speculate as to the adequacy of the charge to the jury, a question which concerned both the majority and the dissenting judge below and is argued here by petitioner (Pet. 24–27).

CONCLUSION

The case was correctly decided below, there is no real conflict of decisions, and no question of general importance is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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